Supreme Court, U.S.
FILED

No. 01 157 JUL 25 2001

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In The Supreme Court of the United States

TURNER O. WILEY,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Petition for a *Writ* of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A *WRIT* OF *CERTIORARI*

Kathleen G. Sumner
LAW OFFICES OF KATHLEEN G. SUMNER
9 Terrace Way, Suite B
Greensboro, North Carolina 27403
(336) 294-9388

Counsel of Record for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED

Whether, under 28 U.S.C. § 1445(c) and the Tenth Amendment to the United States Constitution, the federal courts lack subject matter jurisdiction over cases removed from the state courts which arise under the workers' compensation laws of such states.

PARTIES TO THE PROCEEDING

Petitioner is Turner O. Wiley (Wiley), an individual citizen of the United States, residing in the Middle District of North Carolina. Wiley was the Plaintiff in the District Court, and the Appellant in the Fourth Circuit Court of Appeals.

United Parcel Service, Inc. is a corporation, which is publicly traded. Petitioner is unaware of any publicly held company owning ten percent (10%) or more of said corporation's stock. Respondent United Parcel Service, Inc. was the Defendant in the District Court, and the Appellee before the Fourth Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of Certiorai to review the judgment of the Fourth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Fourth Circuit opinion (App. A) is unpublished. The District Court opinion (App. B) is published at 102 F. Supp. 2d 643 (M.D.N.C. 1999).

STATEMENT OF JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on April 27, 2001.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

A. The Tenth Amendment of the United States Constitution.

B. 28 U.S.C. § 1445(c), a provision of the Judiciary and Judicial Procedure Act.

The Tenth Amendment provides that, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The purpose of the doctrine of Tenth Amendment immunity articulated in National League of Cities v. Usery, 426 U.S. 833 (1976), is to protect States from federal intrusions that might threaten their "separate and independent existence."

Title 28 – Judiciary and Judicial Procedure, Part IV – Jurisdiction and Venue, provides in 28 U.S.C. § 1445(c): "[a] civil action in any State court arising under the workers' compensation laws of such State may not be removed to any district court of the United States."

STATEMENT OF THE CASE

On March 25, 1985, while driving a "package car" for Respondent, Wiley sustained an injury, resulting in a seizure disorder. Respondent denied his claim for workers' compensation benefits and refused to return him to work driving package cars. The union filed a grievance on April 23, 1985, on Wiley's behalf, regarding the refusal to return him to work, and requested that he be compensated for all lost time beginning April 22, 1985. The parties settled the April 23, 1985, grievance as follows: "1) Respondent will file for workers compensation for the seizure disorder claim; 2) Wiley will be allowed to work in the Greensboro hub upon release from the company doctor; 3) at the end of six months, Wiley will be re-evaluated to determine if he is qualified to drive under DOT."

On November 6, 1996, Wiley filed a workers' compensation claim with the North Carolina Industrial Commission, alleging that his posterior dislocation of his right shoulder resulted from his compensable seizure disorder. On January 7, 1997, Wiley returned to his regular job of three hours in the small sort and five hours in the car wash. However, on March 19, 1997, Respondent changed his work hours to four hours in the small sort and four hours in the car wash. On April 9, 1997, Respondent wrongfully terminated Wiley. On April 9, 1997, he filed a grievance with the union. On April 10, 1997, he filed a written complaint with the Commissioner of Labor alleging retaliatory action as a result of exercising his rights under the workers' compensation act.[1]

Upon receipt of the right to sue letter from the North Carolina Department of Labor, Wiley filed a Retaliatory Employment Discrimination Act (REDA) complaint in state court pursuant to N.C. Gen. Stat. § 95-240 et al. Respondent removed this action on February 9, 1998, to federal court on the basis of diversity of citizenship pursuant to 28 U.S.C. §§

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[1] N.C. Gen. Stat. § 95-241, which provides that "[n]o person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do any of the following: (1) File a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to any of the following: a. Chapter 97 of the General Statutes." N.C. Gen. Stat. § 95-241. Chapter 97 of the General Statues is the North Carolina Workers' Compensation Act.

1332 and 1441 and alleged that the amount in controversy exceeds $75,000.00. Thereafter, the district court granted Respondent's motion for summary judgment.

Wiley appealed to the Court of Appeals for the Fourth Circuit. For the first time on appeal, he argued that Respondent wrongfully removed this Retaliatory Discharge action that arose under the Workers' Compensation Act from state court under 28 U.S.C. § 1445(c), which prohibits state claims arising under the workers' compensation laws to be brought into federal court. In an unpublished opinion the Fourth Circuit Court of Appeals per curiam, held "violations of 28 U.C.S. § 1445(c), constitute procedural, not jurisdictional, defects."

REASONS FOR GRANTING THE WRIT

I.
THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

In Humphrey v. Sequentia, Inc., 58 F.3d 1238 (8th Cir. 1995), the Eighth Circuit held that 28 U.S.C. § 1445(c) prohibits removal of state workers' compensation claims regardless of whether the district court's original jurisdiction is based upon diversity or federal question.

> Under the plain meaning of the statute, where a state legislature enacts a provision within its workers' compensation laws and creates a specific right of action, a civil action brought to enforce that right of action is, by definition, a civil action arising under the workers' compensation laws of that state and therefore § 1445(c) applies; under such circumstances, the action would be nonremovable, subject only to the complete pre-emption doctrine.

Humphrey v. Sequentia, Inc., 58 F.3d 1238 (8th Cir. 1995). It is clear from the broad language in Humphrey that the Eighth Circuit views 28 U.S.C. § 1445(c) as a complete bar due to lack of subject matter jurisdiction.

Every other circuit that has considered this issue, except the Fifth Circuit, has held that 28 U.S.C. § 1445(c) is a jurisdictional bar. The First Circuit decision is Armistead v. C&M Transport, Inc., 49 F.2d 43 (1st Cir. 1995) (held that

28 U.S.C. § 1445(c) forbids removal of cases arising under state workers' compensation laws, even though section 1445(c) is invoked for the first time on appeal, thus the district court lacked subject matter jurisdiction). The Tenth Circuit decision is Suder v. Blue Circle, Inc., 116 F.3d 1351 (10th Cir. 1997) (adopting Humphrey holding that section 1445(c) prohibits removal of Oklahoma's retaliatory discharge actions that arise under the workers' compensation laws). The Eleventh Circuit decision is Reed v. Heil Co., 206 F.3d 1055 (11th Cir. 2000) (held that 28 U.S.C. § 1445(c) bars the removal to federal court of claims arising under state workers' compensation laws; Alabama's statute barring retaliation for the filing of workers' compensation claims arises under the State's workers' compensation laws, therefore the district court lacked jurisdiction to entertain the retaliatory discharge claim).

The Fifth Circuit in Williams v. AC Spark Plugs Div. Of Gen. Motors Corp., 985 F.2d 783 (5th Cir. 1993) held that 28 U.S.C. § 1445(c) should be treated as a procedural defect and thus subject to section 1447 (c) thirty day waiver rule. See also, Sherrod v. American Airlines, Inc., 132 F.3d 1112 (5th Cir. 1998) (held that section 1445(c) prohibits removal of state worker's compensation claims regardless of whether jurisdiction is based on diversity or federal question); Trevino v. Ramos, 197 F.3d 777 (5th Cir. 1999) (held that claim for retaliatory discharge is not pre-empted by federal law and 28 U.S.C. § 1445(c) precludes removal of such claims as arising under the workers' compensation laws of any state). However, it should be noted that it was the Texas workers' compensation statutes at issue in these Fifth Circuit cases. In Texas, as the Williams Court observed the plaintiff "could have brought her state workers' compensation claim

originally in federal district court on the basis of diversity." Williams v. AC Spark Plugs Div. Of Gen. Motors Corp., 985 F.2d 783 (5th Cir. 1993).

In the case at bar, the Fourth Circuit sub silentio declined to adopt the Eighth Circuit's holding in Humphrey. Instead, the Fourth Circuit adopted the Fifth Circuit's holding in Sherrod v. American Airlines, Inc., 132 F.3d 1112 (5th Cir. 1998). The Sherrod Court, relying upon Williams v. AC Spark Plugs Div. of Gen. Motors Corp., 985 F.2d 783 (5th Cir. 1993), held that a motion to remand is waived if not made within 30 days after notice of removal because improper removal prohibited under 28 U.S.C. § 1445(c) is merely a procedural defect and not a jurisdictional bar. Sherrod v. American Airlines, Inc., 132 F.3d 1112 (5th Cir. 1998). The Fourth Circuit, in relying upon Williams and its progeny, failed to take into account that the Fifth Circuit in these cases dealt with a workers' compensation scheme unlike any other in the country. Again, Texas allows original jurisdiction in federal court of a workers' compensation claim based upon diversity.

Although in this case, the Fourth Circuit applied a "procedural" interpretation to 28 U.S.C. § 1445(c), in actuality it makes no difference to the Fourth Circuit and the district court divisions whether the motion for remand in a retaliatory discrimination case was in fact a procedural defect or a jurisdictional bar. The courts in this circuit have repeatedly denied remand or otherwise ignored 28 U.S.C. § 1445(c), when injured workers file claims alleging retaliatory discrimination for filing a claim for workers' compensation and timely move for remand. See Hill v. North Carolina Dept. of Correction, 1999 U.S. Dist. LEXIS

5639 (E.D.N.C., Feb. 26, 1999), aff'd 201 F.3d 436 (4th Cir. 1999); Turner v. CTS Con-Way Transp. Services, 1999 U.S. Dist. LEXIS 9809 (M.D.N.C., Apr. 28, 1999); Sayers v. ABB C-E Services, Inc., 1997 U.S.Dist. LEXIS 18304 (W.D.N.C., Oct. 14, 1997); McRae v. Robeson County Group Homes, 1997 U.S. Dist. LEXIS 9668 (E.D.N.C., June 20, 1997); Watkins v. Martin Mills, Inc., 1996 U.S.Dist. LEXIS 19863 (M.D.N.C., Dec. 13, 1996); Nichols v. Limitorque Corp., 1996 U.S. Dist. LEXIS 10092(M.D.N.C., June 13, 1996); Battle v. Perdue Foods, Inc., 1992 U.S. Dist. LEXIS 13769 (E.D.N.C., May 22, 1992).[2]

There is no logical way to reconcile the Fourth Circuit's rejection of the Eighth Circuit's majority view, and adoption of the Fifth Circuit's analysis based upon the unique Texas workers' compensation scheme. This jurisdictional issue is very significant. Federal jurisdictional statutes should be uniformly interpreted and applied.

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[2] These cases are enumerated in Respondent's recent Memorandum of Law in Opposition to Plaintiff's Motion to Remand in Wiley v. United Parcel Service, Inc., 1:01CV 00359 (defendant refused to return plaintiff to work, following a seizure at work due to exposure to diesel fumes and stress for which he filed a workers' compensation claim; the suit alleges defendant retaliated against plaintiff for filing a workers' compensation claim).

II.
THE DECISION OF THE FOURTH CIRCUIT IS INCORRECT.

A. In an effort to control the ever-increasing flow of compensation cases into already strained federal dockets, Congress declared such actions non-removable. Trevino v. Ramos, 197 F.3d 777 (5th Cir. 1999). § 1445(c) explicitly prohibits removal from State court to any district court of the United States, "a civil action arising under the workmen's compensation laws of such State." 28 U.S.C. § 1445(c). The plain reading of the statute supports the proposition that section 1445(c) prohibits the removal of any state worker's compensation claims. Sherrod v. American Airlines, Inc., 132 F.3d 1112 (5th Cir. 1998) (held that section 1445(c) prohibits removal of state worker's compensation claims regardless of whether jurisdiction is based on diversity or federal question).

B. Retaliatory discharge actions that allege wrongful discharge for asserting a workers' compensation claim, arise under the workers' compensation statutes. In Arthur v. E.I. DuPont de Nemours & Co., 58 F.3d 121 (4th Cir. 1995), the Fourth Circuit stated in dicta that "an action for retaliatory discharge is integrally related to the just and smooth operation of the workers' compensation system in that it ensures that those seeking compensation benefits are not scared out of making claims." Arthur v. E.I. DuPont de Nemours & Co., 58 F.3d 121 (4th Cir. 1995).

C. 28 U.S.C. § 1447 (c) authorizes remand for a procedural defect. Whole Health Chir. & Well. v. Humana

M. Plan, ___ F.3d ___ (11th Cir. 2001). A motion to remand a case on the basis of any defect, other than lack of subject matter jurisdiction, must be made within thirty days after notice of removal or the plaintiff loses the opportunity to move for remand. 28 U.S.C. § 1447 (c). However, 28 U.S.C. § 1445(c) precludes the removal of an action to federal court that arises under the workers' compensation laws of any state. 28 U.S.C. § 1445(c). Therefore, a waiver of the right to move for a remand of a state worker's compensation claim depends on whether the removal of such a claim causes a procedural or jurisdictional defect. Williams v. AC Spark Plugs Div. Of Gen. Motors Corp., 985 F.2d 783 (5th Cir. 1993) (28 U.S.C. § 1445(c) should be treated as a procedural defect and thus subject to section 1447 (c) thirty day waiver rule). The Fourth Circuit, in effect, adopted Williams and not Sherrod, since the Sherrod court stretched to find timely objection to remand.

D. Justice Souter, in his concurring opinion in American Dredging Co. v. Miller, 510 U.S. 443 (1994), wrote that

> in most cases, the characterization of a state rule as substantive or procedural will be a sound surrogate for the conclusion that would follow from a more discursive preemption analysis. The distinction between substance and procedure will, however, sometimes be obscure. As to those close cases, how a given rule is characterized for purposes of determining whether federal maritime law preempts state law will turn on whether the state rule unduly interferes with the federal

interest in maintaining the free flow of maritime commerce.

American Dredging Co. v. Miller, 510 U.S. 443 (1994) (in admiralty cases filed in a state court under the Jones Act and the "saving to suitors clause," federal law does not preempt state law regarding the doctrine of forum non conveniens) (Souter, J. concurring).

E. Federal law governs construction of removal statutes. Grubbs v. General Electric Credit Corp., 405 U.S. 699 (1972). Now Chief Justice Rehnquist, writing for the Court in Grubbs v. General Electric Credit Corp., 405 U.S. 669 (1972), held that where after removal a case is tried on the merits without objection and the federal court enters a judgment, the issue on appeal is not whether the case was properly removed, but whether the District Court would have had original jurisdiction if the case had been filed in that court. 28 U.S.C. § 1445(c) explicitly prohibits jurisdiction in District Court of cases arising under the workers' compensation laws of such State. Justice Thomas wrote in U.S. v. Oakland Cannabis Buyers' Cooperative, that the "canon of constitutional avoidance has no application in the absence of statutory ambiguity." U.S. v. Oakland Cannabis Buyers' Cooperative, ___ U.S. ___ (5-14-2001). There is no statutory ambiguity in 28 U.S.C. § 1445(c).

F. Legislative history of 28 U.S.C. 1445(c) reflects Congress' sensitivity to concerns of federalism. Congress passed section 1445(c) as part of a bill that also raised the minimum amount in controversy and imposed other restrictions on diversity jurisdiction. See S. Rep. No.

1830 (1958). The "Statement" section of the report concentrates exclusively on easing the workload of the federal courts. See S. Rep. No. 1830 at 3100-01. The section of the report concerning the workers' compensation provisions also focuses on the increased caseload caused by the removal of workers' compensation cases. See S. Rep. No. 1830 at 3103-06. The report notes, "nearly all of the State statutes on workers' compensation provide summary proceedings for the expeditions [sic] and inexpensive settlement of claims by injured workmen against the employer." See S. Rep. No. 1830 at 3106. The Senate report expresses concern that litigating in a distant federal court will impose an undue burden on workers. See S. Rep. No. 1830 at 3106. This concern applies whether the worker is litigating about compensation for an injury or being fired for filing a compensation claim.

III.
THE QUESTION PRESENTED IS IMPORTANT.

Congress has restricted federal jurisdiction. The framers of the Constitution of the United States "intended to preserve to the states the power that even the colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise." Oregon v. Mitchell, 400 U.S. 112 (1970).

The Constitution "draws a basic distinction between the powers of the newly created Federal Government and the

powers retained by the pre-existing sovereign States." U.S. Term Limits , Inc. v. Thornton, 514 U.S. 779, 801 (1995).

> On the one hand, in the words of Chief Justice Marshall, "it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument." Sturges v. Crowninshield, 4 Wheat. 122, 193 (1819). The text of the Tenth Amendment delineates this principle: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." On the other hand, as Justice Story observed, "the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution did not delegate to them." 1 Commentaries on the Constitution of the United States § 627 (3d ed. 1858) (hereinafter Story). Simply put, "[n]o state can say, that it has reserved, what it never possessed."

Cook v. Gralike, 531 U.S. 510 (2001).

Congress enacted 28 U.S.C. § 1445(c) in order to prevent the federal district courts from hijacking state jurisdiction in cases that arise under the state workers'

compensation laws. Jurisdiction of the federal courts is jealously guarded, by this Court, against expansion by judicial interpretation or by prior action or consent of the parties. Peoples Bank v. Calhoun, 102 U.S. 256 (1880). "To permit a federal district court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them." American Fire & Casualty Co. v. Finn, 341 U.S. 6, 18 (1951).

It is elemental jurisprudence that jurisdiction of the federal district courts is statutorily granted. Article III of the United States Constitution provides that the judicial power of the United States shall be vested in one Supreme Court. This Court retains judicial control over the federal circuit and federal district courts. Therefore, the expansion of jurisdiction by the federal circuit and federal district courts in areas specifically prohibited by Congress, should be zealously guarded. Absent the watchful judicial jurisdictional eye of this Court, the result would be the risk of substantial "disuniformity"[3] in the interpretation of state and federal law.

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[3] See Nevada v. Hicks, 533 U.S. ___ (2001).

IV.

THE DECISION OF THE FOURTH CIRCUIT ADVERSELY IMPACTS MEMBERS OF PROTECTED CLASSES, AND ERADICATES THE STATES' RIGHTS TO HANDLE THEIR RETALIATORY ACTION CLAIMS WHICH ARISE UNDER THE STATE WORKERS' COMPENSATION LAWS.

In our society the persons least able to protect themselves are persons who are members of protected classes, such as African-Americans, women, pregnant persons, persons with disabilities. Employers have many resources, and the abilities and resources to retain attorneys and defend actions. Other circuit courts of appeal have decided the issue of jurisdiction in a manner diametrically opposite to that of this Circuit. The Supreme Court needs to accept certiorari, and to bring the Fourth Circuit into compliance with the Tenth Amendment, the Judiciary and Judicial Procedures Act, other Circuit Courts of Appeal, and the clearly expressed Congressional intent of the Act in its formulation.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Kathleen G. Sumner
Counsel of Record
Attorney for Petitioner
9 Terrace Way, Suite B
Greensboro, NC 27403
Phone: (336) 294-9388
FAX: (336) 294-9144

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APPENDIX

Kathleen G. Sumner
LAW OFFICES OF KATHLEEN G. SUMNER
9 Terrace Way, Suite B
Greensboro, North Carolina 27403
(336) 294-9388

Counsel of Record for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TURNER O. WILEY,
Plaintiff-Appellant,

v. No. 99-2277

UNITED PARCEL SERVICE,
INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro.
William L. Osteen, District Judge.
(CA-99-236-1)

Argued: February 28, 2001

Decided: April 27, 2001

Before MICHAEL, MOTZ, and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Kathleen G. Sumner, LAW OFFICES OF KATHLEEN G. SUMNER, Greensboro, North Carolina, for Appellant. John James Doyle, Jr., CONSTANGY, BROOKS & SMITH, L.L.C., Winston-Salem, North

Carolina, for Appellee. ON BRIEF: Jeanette L. Foust, LAW OFFICES OF KATHLEEN G. SUMNER, Greensboro, North Carolina, for Appellant. Jill S. Stricklin Cox, CONSTANGY, BROOKS & SMITH, L.L.C., Winston-Salem, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 26(c).

OPINION

PER CURIAM:

Turner Wiley sued his employer, United Parcel Services, Inc. (UPS), in North Carolina Superior Court, alleging that UPS retaliated against him for pursuing workers' compensation benefits. UPS removed the suit to the U.S. District Court for the Middle District of North Carolina on the basis of diversity of citizenship. Wiley did not object to the removal, and the parties proceeded with discovery. After discovery was completed, UPS moved for summary judgment, and the motion was granted. The district court held that Wiley did not make out a prima facie case for unlawful retaliation because he failed to establish a causal relationship between his application for workers' compensation benefits and UPS's adverse employment action.* The district court also concluded that even if Wiley could establish a prima facie case, UPS would still be

* Specifically, Wiley's retaliation claim is that UPS terminated him because he filed a compensation claim. Wiley was fired following an altercation with his supervisor, Robert Latchford. Latchford did not know about Wiley's pending compensation Claim when he fired him. In any event, Wiley was later reinstated after his grievance was sustained by the Atlantic Area Panel Grievance Committee.

entitled to summary judgment because the company would have taken the same employment action absent Wiley's protected activity. Wiley now appeals.

After considering the joint appendix, the parties' briefs, and the oral arguments of counsel, we are persuaded that the district court reached the correct result. We therefore affirm substantially on the reasoning of the district court. See *Wiley v. United Parcel Serv.*, No. 1:98CV00126 (M.D.N.C. Aug. 17, 1999). One issue merits further discussion. Wiley argues for the first time on appeal that UPS's removal of his suit to federal court was improper. Wiley contends that removal is barred by 28 U.S.C. § 1445(c), which provides, "A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States." Because Wiley believes that his retaliation claim arises under North Carolina's workers' compensation laws, he asserts that his suit could not be removed to federal court.

Even if Wiley's retaliation claim did arise under North Carolina's workers' compensation laws, Wiley nevertheless waived his right to object to the removal. Under 28 U.S.C. § 1447(c) a "motion to remand [a] case on the basis of any defect *other than lack of subject matter jurisdiction* must be made within 30 days after the filing of the notice of removal." (emphasis added). Thus, § 1447(c) provides that a party who fails to note a non-jurisdictional objection within 30 days of the notice of removal waives the objection. Violations of 28 U.S.C. § 1445(c) have been held to constitute procedural, and not jurisdictional, defects. *See, e.g. Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1117 (5th Cir. 1998); *Ayers v. ARA Health Servs., Inc.*, 918 F. Supp.

143, 146-7 (D. Md. 1995). Accordingly, a party seeking to invoke § 1445(c) must object to removal within thirty days after the filing of a notice of removal. Here, Wiley failed to object to UPS's removal of the suit in a timely manner. UPS filed its notice of removal on February 9, 1998. Wiley, however, did not object until the initiation of this appeal on September 13, 1999. Because his objection was made over thirty days after removal, he has waived his argument for improper removal.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

TURNER O. WILEY,

Plaintiff,

v. 1:98CV00126

UNITED PARCEL SERVICE, INC.,

Defendant.

MEMORANDUM OPINION

OSTEEN, District Judge

This matter is before the court pursuant to Defendant United Parcel Service, Inc.'s (UPS) Motion for Summary Judgment. Plaintiff Turner O. Wiley originally filed this action in state court alleging that UPS terminated him and failed to reinstate him in retaliation for having filed workers' compensation claims in violation of the North Carolina Retaliatory Employment Discrimination Act (REDA), N.C. Gen. Stat. § 95-241 et seq. (1998). Defendant removed to this court on the basis of diversity of citizenship. For the reasons discussed herein, Defendant's Motion for Summary Judgment will be granted.

I. FACTUAL BACKGROUND

Plaintiff began working for UPS in the Greensboro, North Carolina, facility (Facility) in 1975. After holding various part-time positions for several years, Plaintiff became a full-time package car driver (driver) in 1979. (Pl.'s Dep. at 35-37, 41.) Plaintiff became medically disqualified as a driver in 1985. Specifically, while driving a UPS package car, Plaintiff suffered an epileptic seizure, lost

consciousness, and struck another vehicle. Id. at 42-43, 45-46.

Plaintiff, a member of the International Brotherhood of Teamsters-Local Union No. 391 (Union), filed a grievance over UPS's refusal to allow him to continue driving. The grievance was resolved under an agreement in which UPS would file a workers' compensation claim based on the seizure and Plaintiff would be assigned to work inside the Facility after being released by the company doctor. (Pl.'s Dep. at 46-48, Dep. Ex. 2.)

After Plaintiff was released to work, he was assigned a full-time position in the loading/unloading and car wash areas. (Pl.'s Dep. at 48-50.) UPS created this position for Plaintiff. Id. at 314.[1] At this time, Plaintiff was one of only two UPS employees working full-time inside the Facility. Id. at 48-50. In 1986, Plaintiff began dividing his time between the car wash and small sort areas of the Facility. After 1 ½ to 2 months working an eight-hour shift in the small sort area, Plaintiff returned to his previous car wash/sorting job with reduced hours in the small sort. This job required Plaintiff to work three hours in small sort and five hours in the car wash area (three/five schedule). (Pl.'s Dep. at 75, 114.)[2]

In 1993 and 1995, Plaintiff suffered a job-related back injury while lifting the hood of a package truck. In both instances, Plaintiff filed a workers' compensation claim, the claim was accepted by UPS, and Plaintiff received disability benefits. (Pl.'s Dep. at 67-70, 88-91, Dep. Exs. 7-8, 12-14.)

In June 1996, Plaintiff suffered an epileptic seizure at home. Plaintiff fell, dislocated his shoulder, and left UPS on disability leave. (Pl.'s Dep. at 97-100, Dep. Exs. 19-20.) In November 1996, Plaintiff filed a workers' compensation

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[1] Traditionally, the car wash was staffed by part-time employees who were qualified to drive. (Snyder Dep. at 43-44.)

[2] Although Plaintiff was assigned to the three/five schedule, he often worked less than three hours in small sort and spent more time in the car wash. (Pl.'s Dep. at 114; Snyder Dep. at 50-51.)

claim with respect to his shoulder injury. Plaintiff contended his epilepsy was an occupational disease and that the stress of his employment activated or accelerated the seizure. UPS and its insurance carrier denied the claims. (Pl.'s Dep. at 99-100, 120-121, Dep. Exs. 21-22, 28.) After Plaintiff was released to full-duty employment in January 1997, he returned to UPS and resumed working the three/five schedule. (Pl.'s Dep. at 110-11, 113, Dep. Ex. 25.)

About this time, Bob Latchford transferred to the Greensboro Facility as division manager and UPS underwent operational changes that affected the car wash area. Specifically, in order to reduce costs, UPS began washing each package car on an "as needed" basis instead of daily. (Pl.'s Dep. at 116.) UPS also eliminated overtime and reduced hours for all employees in the car wash. (Latchford Dep. At 128; Snyder Dep. at 49-51.) Because of the operational changes, in March 1997, Plaintiff's official three/five work schedule was changed to four hours in the small sort and four hours in the car wash (four/four schedule). (Pl.'s Dep. at 116, 121-22, Dep. Ex. 29; Latchford Dep. at 120-21.)

Plaintiff resisted the alteration in his work schedule and informed UPS that he did not intend to comply with the change. (Pl.'s Dep. at 145-146) On several occasions, Plaintiff approached Latchford to express his dissatisfaction. Despite UPS's operational needs, Plaintiff claimed that his seniority entitled him to continue working the three/five schedule. Id. at 125. Plaintiff also believed he should be paid a higher rate for working an additional hour in the small sort.[3] Id. Plaintiff expressed concern that the restrooms were located too far from the small sort and complained that the sorter bins were not ergonomically correct. Id. at 131-32, 146-7.

In response to Plaintiff's objections, Latchford repeatedly explained that due to operational changes, there

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[3] Plaintiff had previously filed grievances with respect to various pay issues. The grievances were resolved adversely against Plaintiff. (Def.'s Br. Supp. Mot. Summ. J. at 4) (citing Pl.'s Dep. at 83-86).

was no need for Plaintiff to work in the car wash for five hours each shift. Latchford reviewed Plaintiff's previous 1990- and 1994-wage related grievances and determined that Plaintiff was being paid the correct wage. Finally, Latchford evaluated the small sort area and determined that Plaintiff's work station was ergonomically correct. (Pl.'s Dep. at 123, 140-47, 155; Latchford Dep. at 214.) Although Plaintiff did not agree with Latchford's stance, he understood Latchford's position. (Pl.'s Dep. at 144-45.)

In March 1997, Plaintiff attempted to resume his former three/five schedule. Without authorization from UPS and contrary to Latchford's explicit instructions, Plaintiff left the small sort and went to the car wash at the end of three hours. (Pl.'s Dep. at 148-49, 155-57.) Latchford instructed Plaintiff that unless he continued working in the small sort as required by the four/four schedule, his employment would be terminated for a work stoppage. Id. at 155-56. Plaintiff testified that following this incident, he complied with UPS's instructions and continued to work the four/four schedule from March 1997 until he was terminated on April 9, 1997. Id. at 155-59. Nevertheless, despite understanding the company's position, Plaintiff continued to approach Latchford to discuss the issue. Plaintiff also filed a grievance against Bill Snyder, his immediate supervisor in the car wash, for allowing the change to happen. (Pl.'s Dep. at 157-60, 174-75, Dep. Ex. 32.)[4]

At some point prior to his termination on April 9, 1997, Plaintiff told Latchford that if he worked in the small sort for four hours, he might have to use the restroom "20-some times on that particular day." (Pl.'s Dep. at 185) According to Plaintiff, Latchford replied, "Nobody has to go to the bathroom 27 times; you better go get checked out." Id. at 187.

On April 9, 1997, Plaintiff once again went to Latchford's office to try and explain his position regarding the changed work schedule. Plaintiff closed Latchford's

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[4] This grievance was never pursued by the Union. (Pl.'s Dep. at 175-77.)

door behind him for "privacy reasons" and stated he risked further injury if he continued working the four/four schedule.[5] Plaintiff also argued his new schedule violated his seniority. Id. at 160-61. According to Plaintiff, Latchford became angry, jumped up from his chair, raised his voice and exclaimed, "We're not going to talk about this shit anymore." Id. at 164-66. Plaintiff, after explaining to Latchford that he believed Latchford had "cursed" him, told Latchford that there were other safety issues which needed to be addressed. Plaintiff insisted, "We still need to talk," and Latchford allegedly responded, "Well, we're not going to talk." Latchford then tried to leave the office.[6] Id. at 167-69.

Although Plaintiff was located between Latchford and the door, Plaintiff did not immediately move away from the door to allow Latchford to leave. Id. at 169. Instead, Plaintiff blocked Latchford's path for "[m]aybe fifteen seconds." Latchford immediately began yelling for help and Jeff York, a UPS supervisor, responded to Latchford's calls and tried to enter the office. Id. at 169-71. Initially, York was unable to open the door because Plaintiff was standing with his back to the door. Id. at 171. Until Plaintiff turned around and stepped aside, which took a couple of seconds, York could not enter the office. Id.

During this interaction, Latchford told Wiley he was terminated for failure to work as instructed and gross insubordination. (Pl.'s Dep. at 172-73; Latchford Dep. at 172-73.) Latchford and Plaintiff then went to see Mike McGaha, a Union official. Latchford explained that Plaintiff had blocked the door and refused to let Latchford out of his

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[5] Plaintiff presented no medical evidence to support his contention. (Pl.'s Dep. at 133.)

[6] There is factual dispute regarding whether there were one or two interactions. Latchford testified he instructed Plaintiff to return to his work station and that Plaintiff came back to Latchford's office several minutes later and insisted they talk again. (Latchford Dep. at 173.) Because Plaintiff is the nonmoving party, the court will accept the implication in his testimony that the entire course of events consisted of one interaction.

office. (Pl.'s Dep. at 178.) Latchford said he felt threatened. Id. Although McGaha told Latchford he did not have grounds to terminate Plaintiff based on the fact he felt threatened, Latchford reiterated that Plaintiff's employment had been terminated and that if Plaintiff did not leave of his own accord, he would be escorted off the premises. Id. at 179.

On April 14, 1997, Latchford sent Plaintiff a letter formally notifying him of his termination for failure to work as directed and gross insubordination. (Def.'s Br. Supp. Mot. Summ. J. at 6) (citing Pl.'s Dep. at 80, Dep. Ex. 33). Latchford was unaware of Plaintiff's prior workers' compensation claims when he terminated Plaintiff. (Latchford Dep. at 204.) The Union filed a grievance based on Plaintiff's discharge and the grievance was upheld by the Atlantic Area Parcel Grievance Committee (AAPGC) on May 20, 1997. (Pl.'s Dep. at 180-81, 189-90; Dep. Exs. 34, 38.)

Following the AAPGC's decision, Plaintiff met with Latchford and another UPS official to discuss his return to work. Latchford told Plaintiff he had to return to the four/four schedule. Plaintiff disagreed and argued that the AAPGC's decision and his seniority entitled him to remain on the three/five schedule. (Pl.'s Dep. at 192-95; Latchford Dep. at 123, 126, 165-66.)

At the meeting, UPS officials expressed concern over Plaintiff's apparent need to use the restroom frequently.[7] UPS insisted that Plaintiff obtain a medical examination to verify this contention. Id. at 195. Plaintiff produced correspondence from two doctors stating that his seizure

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[7] UPS first learned of this contention on April 9, 1997, when Plaintiff told Latchford he would be unable to work four hours in the small sort area that day because he might have to use the restroom "twenty some times." (Pl.'s Dep. at 182-85, 254-55; Latchford Dep. at 167-68, 171.)

UPS also learned that instead of walking 200 yeard from the car wash to the restroom, Plaintiff would, for convenience sake, urinate in the car wash drain. (Pl.'s Dep. at 131-33.)

medication was a diuretic that caused frequent urination.[8] (Pl.'s Dep. at 195, Dep. Exs. 35, 36.) A physician designated by UPS affirmed that Plaintiff's medication could cause him to urinate 10-20 times in a four-hour period. The physician also concluded that Plaintiff's medication schedule should not be altered. (Pl.'s Dep. at 196-97, Dep. Ex. 38.)

Due to Plaintiff's refusal to work the four/four schedule and Plaintiff's need to urinate frequently during the first four hours of his shift, UPS did not have a job available for him on the twilight shift. Instead, UPS offered to assign Plaintiff to the same position starting on the midnight or sunrise shifts so the effects of his diuretic medication would have time to diminish prior to work. Plaintiff declined the offer and stated that with more than 22 years experience, he was not interested in working different hours. (Pl.'s Dep. at 197-99, 205-207, Dep. Exs. 44, 45; Latchford Dep. at 124, 165-66, 169.) As a result, in late May or early June 1997, Plaintiff was placed on medical leave and told he should not return to work until he was approved by UPS. (Pl.'s Dep. at 201, 239-41, Dep. Ex. 60; Latchford Dep. at 166.)

In August 1997, the Union filed a grievance on Plaintiff's behalf concerning UPS's failure to reinstate Plaintiff to his former three/five schedule on the twilight shift. (Pl.'s Dep. at 209, Dep. Ex. 47.) The grievance was deadlocked before the AAPGC and the National Grievance Committee and was subsequently submitted to arbitration. (Pl.'s Dep. at 212-15, Dep. Ex. 49-52.)

In the fall of 1997, Plaintiff attempted to return to work without obtaining approval from the company. (Pl.'s dep. at 239-41.) Plaintiff was told he was still on medical leave and that UPS had not approved his return to work. Additionally, UPS sent Plaintiff a letter in which the company stated: "In order for you to return from medical leave you must provide a note from your doctor stating that you can resume full-duty and perform the job without

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[8] The correspondence is dated May 14 and May 19, 1997. (Pl.'s Dep. Exs. 35, 36.)

frequent or excessive time away from you[sic] assigned work stations." (Pl.'s Dep. at 240-41, Dep. Ex. 60.) Plaintiff was directed to forward any medical updates from his treating physician to UPS. Id.

UPS officials met with Plaintiff on December 5, 1997, to discuss his return to work. UPS offered Plaintiff two different unloading and sorting positions on the twilight shift. Plaintiff had previously performed the two jobs and both were located near restroom facilities. Plaintiff declined the offers. (Pl.'s Dep. at 38, 48, 244-45, 249-53, Dep. Ex. 63.)

Plaintiff's physician released him to return to work effective March 16, 1998. [9] Plaintiff was permitted to perform full work duties in the small sort and car wash with the restriction of no lifting over 50 pounds, not squatting, and occasional bending and stooping. (Pl.'s Dep. at 256-59, Dep. Exs. 66-67.)

In early May 1998, UPS notified Plaintiff that the company had received Plaintiff's physician's most recent work restrictions and that the company remained concerned about Plaintiff's need to leave his work station to urinate up to 20 times in a four-hour period. According UPS, the company was "willing to return (Wiley) to work in a job assignment within [his] medical restrictions as well as within a short distance from bathroom facilities." (Pl.'s Dep. at 275, Dep. Ex. 77.) Plaintiff deemed the offer insulting. (Pl.'s Dep. at 276, Dep. Ex. 78.)

The parties were unable to meet again to discuss Plaintiff's grievance regarding his reinstatement was denied by arbitrator James Scearce. (Pl.'s Dep. at 290, 306-07, Dep. Exs. 82, 86.) The arbitrator found that UPS:

> [W]as within its authority to deny [Plaintiff] the opportunity to return to the work schedule he held prior to June 3, 1997 [three/five schedule]. [UPS] has demonstrated sufficient cause to

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[9] Plaintiff's physician instructed him to undergo a functional capacity evaluation to help determine his working capacity. (Pl.'s Dep. at 256-59, Dept. Ex. 66.)

> establish a work schedule that facilitates [Plaintiff's] apparent need to repeatedly urinate and minimizes the need for him to be absent from his work responsibilities, so long as such work assignment is within the medical limitations of [Plaintiff]. . . .The [Plaintiff] must demonstrate the willingness and ability to perform the duties assigned.

(Dep. Ex. 86 at 17.)

In February 1999, Plaintiff returned to work at UPS as a fueler. The job allows Plaintiff to work within his lifting restrictions and is located closer to a restroom than the small sort or car wash areas. (Kociolek Dep. at 127; Latchford Dep. at 49-57, 65, 209-18, 220-21.)

II. DISCUSSION

A. Summary Judgment Principles

Summary judgment is appropriate in those cases where it is established through pleadings, affidavits, depositions, and other discovery documents that there exist no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510 (1986). Thus, it is the burden of the moving party to show the court that no material factual issues exist for trial. Of course, the court must draw any permissible inference from the underlying facts as established in the record in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S. Ct. 1348, 1356-57 (1986); Pulliam Inv. Co. v. Cameo Prop., 810 F.2d 1282, 1286 (4th Cir. 1987).

When the moving party has carried its burden, the nonmoving party must come forward with evidence which shows more than some "metaphysical doubt" that genuine and material factual issues exist. Matsushita, 475 U.S. at

586, 106 S. Ct. at 1356. A mere scintilla of evidence presented by the nonmoving party is insufficient to circumvent summary judgment. Anderson, 477 U.S. at 252, 106 S. Ct. at 2512. Rather, the nonmoving party must convince the court that, upon the record taken as a whole, a rational trier of fact could find for the nonmoving party. Id. at 248-49, 106 S. Ct. at 2510-11. More specifically, "the court can determine that a trial is unnecessary only if either the facts are undisputed, or if disputed, the dispute is of no consequence to the dispositive question." Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1315-16 (4th Cir. 1993).

B. Retaliatory Discharge in Violation of North Carolina General Statute § 95-241

The North Carolina Retaliatory Employment Discrimination Act (REDA), N.C. Gen. Stat. § 95-241 et seq., prohibits employers from discriminating or retaliating against employees based upon good faith claims for workers' compensation. N.C. Gen. Stat. § 95-241(a). In order for an employee to prevail under this statute, the employee must prove that retaliatory motive was a substantial factor in the adverse employment actions taken by the defendant. Johnson v. Friends of Weymouth, Inc., 120 N.C. App. 255, 259, 461 S.E.2d 801, 804 (1995), disc. review denied, 342 N.C. 895, 467 S.E.2d 903 (1996). The statute "does not prohibit all discharges of employees who are involved in a workers' compensation claim[;] it prohibits only those discharges made because the employee exercises his compensation rights. (Emphasis added.) The burden of proof in a retaliatory discharge action is on the employee." Morgan v. Musselwhite, 101 N.C. App. 390, 393, 399 S.E.2d 151, 153, disc. review denied, 329 N.C. 498, 407 S.E.2d 536 (1991) (decision based on N.C. Gen. Stat. § 97-6.1).

The North Carolina Supreme Court has recognized that federal decisions can offer guidance in establishing evidentiary standards in employment discrimination cases. Abels v. Renfro Corp., 355 N.C. 290, 218, 436 S.E.2d 822,

828 91993). Since Plaintiff has offered no direct evidence in support of his claim of retaliatory discharge, he must seek to establish his claim pursuant to the inferential proof scheme set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973).

A plaintiff can establish a prima facie case of retaliation under the McDonnell Douglas proof scheme by demonstrating by a preponderance of the evidence that "(1) the employer was aware of [the] plaintiff's participation in protected activity; (2) that an adverse employment action was taken against the plaintiff engaged in the protected activity; and (3) that the two elements are related causally." Strickland v. MICA Info. Sys., 800 F. Supp. 1320, 1323 (M.D.N.C. 1992); Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985).[10] If the plaintiff presents a prima facie case and establishes that the filing of his workers' compensation claims were a substantial factor in the employer's adverse employment actions, "the burden shifts to the defendant to show that the same decision would have been made if the employee had not engaged in the protected activity." Johnson, 120 N.C. App. at 259, 461 S.E.2d at 804. REDA specifically provides:

> It shall not be a violation of this Article for a person to discharge or take any other unfavorable action with respect to an employee who has engaged in protected activity as set forth under this Article if the person proves by the greater weight of the evidence that it would have taken the same

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[10] The North Carolina Court of Appeals has set forth a similar legal standard for evaluating retaliation cases where an employee was terminated for filing an OSHA complaint, conduct protected under N.C. Gen. Stat. § 95-241. This standard requires the plaintiff to show that the protected activity was a substantial causative factor in the employee's termination, and that the employer has not shown by a preponderance of the evidence that it would have taken the same action against the employee in the absence of the protected activity. Brooks v. Stroh Brewery Co., 95 N.C. App. 226, 230, 382 S.E.2d 874, 878, disc. review denied, 325 N.C. 704, 388 S.E.2d 449 (1989).

> unfavorable action in the absence of the protected activity of the employee.

N.C. Gen. Stat. § 95-241(b).

Once the defendant articulates a legitimate nondiscriminatory reason for the discharge, the presumption created by the prima facie case is rebutted and "simply 'drops out of the picture.'" Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996) (quotation omitted). The burden then shifts to the employee to show that the given reason was a pretext for retaliation. See Evans, 80 F.3d at 959. The plaintiff always bears the ultimate burden of proving that his employer intentionally retaliated against him and can fail to meet his burden not only by failing to establish a prima facie case, but also by failing to show a genuine factual dispute over the employer's legitimate nondiscriminatory reason. Mitchell, 12 F.3d at 1317.

Plaintiff has failed to establish a prima facie case of unlawful retaliation. With regard to Plaintiff's termination, Plaintiff has not established a causal connection with the filing of his workers' compensation claims. It is undisputed that Latchford, who arrived at the Facility in January 1997, did not know of Plaintiff's prior workers' compensation claims when he terminated Plaintiff's employment on April 9, 1997.[11] (Latchford Dep. at 204.) Because Latchford, the decision maker, knew nothing of Plaintiff's prior workers' compensation claims, the employment decision could not have been motivated by retaliatory intent. See, e.g., Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d

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[11] In Plaintiff's Supplemental Memorandum in Opposition to Defendant's Motion for Summary Judgment, Plaintiff contends that "Latchford . . testified that he never was aware of Turner Wiley's workers' compensation claim, even though he testified at the Industrial Commission hearing regarding . . . Wiley's workers' compensation claim." (Pl.'s Supp. Mem. Opp'n Def.'s Mot. Summ. J. at 1) (citing Latchford Dep. at 116-19). However, the Industrial Commission hearing took place more than a month after Plaintiff's termination and at no point has Plaintiff presented evidence that Latchford knew of Plaintiff's workers' compensation claims at the time he was fired.

653, 657 (4th Cir. 1998) (citations omitted); Lewis v. Runyon, No. 96-1845 (4th Cir. Dec. 24, 1996).

In workers' compensation retaliation cases, North Carolina courts also look for a "close temporal connection between [the] plaintiff's instituting a charge and his termination." Shaffner v. Westinghouse Elec. Corp., 101 N.C. App. 213, 216, 398 S.E.2d 657, 659 (1990) (finding no close temporal connection where plaintiff was ultimately terminated three months after instituting a workers' compensation claim in light of evidence that the plaintiff had previously received benefits for compensable injuries), disc. review denied, 328 N.C. 333, 402 S.E.2d 839 91991). In the case at bar, Plaintiff filed workers' compensation claims in April 1993, January 1995, and November 1996. Therefore, his most recent claim was brought approximately five months before his discharge in April 1997 and six months prior to Defendant's refusal to reinstate Plaintiff in May 1997. Under North Carolina law, these events are not sufficiently close in time to establish a causal connection. Id.

Plaintiff has testified that several facts demonstrate UPS's retaliatory motive. First, Plaintiff contends that universal workers' compensation claims faced by UPS coupled with Plaintiff's workers' compensation claims created an incentive on the part of UPS to discharge him.[12] (Pl.'s Dep. at 310-13.) Second, Plaintiff argues that retaliatory motive may be inferred because UPS did not accept responsibility and treat his 1985 seizure and accident

[12] Following Plaintiff's accidnet in 1985, UPS created a special shift and assignment for Plaintiff. The company accepted workers' compensation claims filed by Plaintiff in 1993 and 1995 and modified his job duties to accommodate his physical restrictions. At one point, Plaintiff described his duties in the car wash as filing buckets with soap and water. (Snyder Dep. at 41, 51.) In 1997, Plaintiff's sole responsibility in the car wash consisted of washing the package car windows. Id. at 41-42.) This conduct on the part of UPS does not give rise to an inference of retaliatory motive.

as a workers' compensation injury.[13] Id. at 312, 314-15. Third, Plaintiff testified that because Latchford and other UPS employees involved in his termination had only recently arrived at the Facility, they would have no other reason to discharge him other than being ordered to do so by the company. Id. at 313. Finally, Plaintiff contends he was allowed to return to work without incident when his workers' compensation claims were accepted by the company, but was harassed and later discharged after his November 1996 claim was denied. Id. at 313-14, 316, 318.

None of these facts gives rise to an inference that UPS retaliated against Plaintiff for filing workers' compensation claims. Plaintiff has failed to establish a causal connection between the filing of his claims and any adverse employment action taken by UPS.[14] Plaintiff's good faith belief of retaliatory intent, without more, is not enough to withstand summary judgment. See, e.g., Laughlin v. Metropolitan Washington Airports Auth., 952 F. Supp. 1129, 1140 (E.D. Va. 1997) ("Even though all doubts must be resolved in [plaintiff's favor, allegations alone will not defeat summary judgment." (quotation omitted), aff'd, 149 F.3d 253 (4th Cir. 1998); EEOC v. Clay Printing Co., 955 F.2d 936, 945 (4th Cir. 1992) (statement of subjective belief insufficient; affidavit not based on intuition).

Plaintiff also contends that UPS unlawfully failed to reinstate him to his previous three/five schedule after his

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[13] Twelve years had elapsed between Plaintiff's 1985 accident and his termination in 1997.

[14] In addition, in Plaintiff's responses to Defendant's interrogatories, Plaintiff did not link his termination and failure to be reinstated with the filing of his workers' compensation claims. (Pl.'s Dep. at 306, Dep. Ex. 85.) Instead, Plaintiff speculated that UPS's employment decisions were due to a myriad of unrelated circumstances includeing Plaintiff's Union activities, and alleged conspiracy involving UPS and the Union, Plaintiff's belief that UPS wanted to rid the Facility of full-time employees, and speculation that Doug Starnes, UPS's district labor manager, had embarked on a personal vendetta against Plaintiff for filing a charge of wage discrimination with the National Labor Relations Board in 1996. Id.

grievance was upheld by the AAPGC on May 20, 1999. (Compl. ¶¶ 10-12; Pl.'s Dep. at 283-84, 325-26.) The court is not convinced that the failure to reinstate gives rise to a REDA claim. See Sayers v. ABB C-E Serv., Inc., No.4:97CV37 (W.D.N.C. Oct. 15, 1997) (REDA provides a remedy for retaliatory discharge and not the failure to recall). Nevertheless, Plaintiff has not established causation, and UPS's refusal to reinstate Plaintiff to his former schedule cannot be found to have been an adverse employment action. Plaintiff's former three/five schedule no longer existed at the Facility and Plaintiff adamantly refused alternative shifts and positions that would more effectively accommodate his medical condition. Defendant's actions complied with the collective bargaining agreement ant the company was justified in placing Plaintiff in a job and work schedule that satisfied his lifting restrictions and more effectively accommodated his need to frequently urinate. (Pl.'s Dep. at 38, 48, 197-99, 205-07, 244-45, 249-53, 306-07, Dep. Exs. 44, 45, 60, 62, 86 at 16-17.)

Even if Plaintiff had established a prima facie case of retaliation, which he has not, Defendant would still be entitled to judgment as a matter of law. Defendant has established it "would have taken the same unfavorable action in the absence of the protected activity of the employee." N.C. Gen. Stat. § 95-241(b). It is undisputed that Latchford did not know of Plaintiff's prior workers' compensation claims at the time Plaintiff was terminated.

Although Plaintiff's grievance regarding his termination was upheld by the AAPGC, Plaintiff admitted he resisted the change in his work schedule and refused to work the four/four schedule on one occasion prior to his discharge. (Pl.'s Dep. at 148-49, 155-57.) Plaintiff also admitted he was involved in an altercation with Latchford. Latchford felt intimidated and threatened by Plaintiff's conduct, called for help, and later terminated Plaintiff.

In Plaintiff's response to Defendant's motion for summary judgment, Plaintiff alleges Defendant's reasons for terminating Plaintiff and failure to reinstate him to his former

three/five schedule are pretexts for retaliation and a genuine issue exists for trial. Plaintiff's evidence is based on conclusory allegations and his subjective belief that his is the victim of retaliation. This evidence is insufficient to withstand summary judgment. See, e.g., Yarnevic v. Brink's, Inc., 102 F.3d 753, 757 (4th Cir. 1996) (citation omitted). Instead, Plaintiff must set forth sufficient evidence from which a jury could reasonably conclude that UPS retaliated against Plaintiff. Clay Printing Co., 955 F.2d at 943.

Plaintiff relies on his affidavit for the proposition that he filed a workers' compensation claim in 1985 that UPS denied and that he worked as directed until his termination in April 1997. (Pl.'s Br. Supp. Denial Mot. Summ. J., Wiley Aff. ¶¶ 2-4, 2.) In the same affidavit, however, Plaintiff states it was his understanding "that [UPS} accepted my workers' compensation claim involving the seizure disorder on March 25, 1985." Id. ¶ 7. Plaintiff also unequivocally testified at his deposition that he did not file a workers' compensation claim based on the 1985 seizure and accident. (Pl.'s Dep. at 313-14, 321-22.)

Plaintiff's statement in his affidavit that he "worked as [he] was directed" before his termination is contradicted by Plaintiff's testimony that he did not intend to comply with the change to his work schedule and that on one occasion Plaintiff attempted to ignore the change in his schedule and resume his former three/five schedule. (Pl.'s Br. Supp. Denial Mot. Summ. J., Wiley Aff. ¶ 12; Pl. Dep. at 145-49.) Because these portions of the affidavit directly contradict Plaintiff's earlier deposition testimony, the court will not consider these portions of the affidavit. See, e.g., Rohrbough v. Wyeth Lab., Inc., 916 F.2d 970, 974-75 (4th Cir. 1990).[15]

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[15] The court will not consider Plaintiff's statement that UPS terminated his employment on the same day the company received notice of Plaintiff's workers' compensation claim and Plaintiff's assertion that he worked the three/five schedule continuously from 1985 until March 1997. (Pl.'s Br. Supp. Denial Mot. J. at 2, 7, 10-11.) Plaintiff has submitted no evidence to support the former statement and the latter

In his response, Plaintiff contends the following material facts reveal a retaliatory motive on the part of Defendant; (1) Although Plaintiff was released to part-time duty in December 1996 by his physician, UPS did not allow him to return to work until he was released to full-duty employment in January 1997; (2) Plaintiff's three/five schedule was suddenly changed after 12 years and he was not offered the higher rate of pay for working in the small sort; (3) Plaintiff was not immediately returned to work after the AAPGC arbitration decision sustained his grievance regarding his termination. (Pl. Br. Supp. Denial Mot. J. at 6-7, 10.)

None of these facts supports an inference of retaliatory intent. Plaintiff was allowed to return to his former three/five schedule as soon as he was released to return to full-duty employment. (Pl.'s Dep. at 110-11, 113, 116-17, Dep. Ex. 25.) Plaintiff had been released to return to work on a part-time basis on December 9, 1996, but the company was not required to place Plaintiff in a position that exceeded his medical limitations. There is not indication Plaintiff filed a grievance concerning any UPS delay in returning him to work. (Def.'s Reply at 7; Dep. Ex. 23.)

UPS changed Plaintiff's work assignment from the three/five schedule to the four/four schedule in March 1997 due to operational changes that required fewer employees in the car wash areas. The court finds no causal relationship between Plaintiff's November 1996 workers' compensation claim and the change in his schedule which occurred four month's later.

Plaintiff's repeated complaints of dissatisfaction with his pay rate predated and are not causally related to the filing of his workers' compensation claim. (Def.'s Reply Br. At 8) (citing Pl. Dep. at 83-86, 125-28, 142).

Finally, Plaintiff was not immediately reinstated in May 1997 after the AAPGC sustained Plaintiff's wrongful

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assertion is unsupported and contradicted by the record. (Def.'s Reply Br. At 5-6.)

discharge grievance because Plaintiff refused to work the four/four schedule. (Pl.'s Dep. at 192-95; Latchford Dep. at 123, 126, 165-66.)

On July 8, 1999, with the court's permission, Plaintiff submitted a supplemental memorandum in opposition to Defendant's motion for summary judgment. Plaintiff cites to the deposition transcripts of several UPS officials and contends UPS's policy with respect to temporary alternate work is discriminatory under REDA. (Pl.'s Supp. Mem. Opp'n Def.'s Mot. Summ. J. at 1.) Plaintiff has never described the temporary alternate work policy to the court, and the court has examined the testimony of UPS officials and does not find any basis for a discriminatory policy.

Plaintiff also contends a pattern of discrimination exists at UPS that can be understood by comparing the company injury log and the grievance-related documents produced by UPS. Id. at 2-3.

The court is unable to discern any connection between the documents. It is correct that some employees who filed grievances also reported injuries to UPS, but this in no way creates an inference of discrimination against employees who sustain and claim a work-related injury. Id. at 3.

III. CONCLUSION

For the reasons discussed herein, Defendant's Motion for Summary Judgment will be granted.

A judgment in accordance with this memorandum opinion shall be filed contemporaneously herewith.

This the 17th day of August 1999.

/s/ William L. Osteen

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

TURNER O. WILEY,
Plaintiff,

v. 1:98CV00126

UNITED PARCEL SERVICE, INC.,
Defendant.

JUDGMENT

OSTEEN, District Judge

For the reasons set forth in the memorandum opinion entered contemporaneously herewith,

IT IS ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment [24] is granted.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's Motion in Limine [30] is dismissed as moot.

This the 17th day August, 1999.

/s/ / William L. Osteen

United States District Judge

Supreme Court, U.S.
FILED
AUG 22 2001
CLERK

No. 01-157

In The
Supreme Court of the United States

TURNER O. WILEY,
Petitioner,

v.

UNITED PARCEL SERVICE, INC.,
Respondent.

On Petition for a *Writ* of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A *WRIT* OF *CERTIORARI*

Brian D. Edwards*
Meredith W. Holler
ALSTON & BIRD LLP
Bank of America Plaza
101 South Tryon Street, Suite 4000
Charlotte, North Carolina 28280-4000
(704) 444-1000

** Counsel of Record for Respondent*

QUESTION PRESENTED

Respondent objects to Petitioner's statement of the Question Presented because it ignores the holding of this Court in Grubbs v. General Electric Credit Corp., 405 U.S. 699 (1972). Under that decision, the Question Presented in this matter should be:

Whether the federal courts have original subject matter jurisdiction pursuant to 28 U.S.C. § 1332 over a cause of action alleging a violation of the North Carolina Retaliatory Employment Discrimination Act, N.C. Gen. Stat. §§ 95-240 to -245 (1999), where the parties are citizens of different states and the amount in controversy exceeds $75,000.

PARTIES TO THE PROCEEDING

United Parcel Service, Inc, is a privately held corporation incorporated under the laws of the State of Ohio. United Parcel Service, Inc. is a wholly-owned subsidiary of United Parcel Service, Inc., a corporation incorporated under the laws of the State of Delaware. United Parcel Service, Inc. (Delaware) is a publicly traded company.

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No. 01-157

In The
Supreme Court of the United States

TURNER O. WILEY,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Petition for a *Writ* of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A *WRIT* OF *CERTIORARI*

Respondent United Parcel Service, Inc. respectfully opposes Petitioner Turner Wiley's Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF THE CASE

A. The District Court Proceedings

On April 10, 1997, Petitioner Turner O. Wiley ("Wiley") filed a complaint with the North Carolina Department of Labor asserting that Respondent United Parcel Service, Inc. ("UPS") had retaliated against him for pursuing workers' compensation benefits in violation of the North Carolina Retaliatory Employment Discrimination Act, N.C. Gen. Stat. §§95-240 to –245 (1999) ("REDA").[1] The Department of Labor subsequently issued a right-to-sue letter to Wiley on October 31, 1997.

On January 7, 1998, Wiley initiated this action by filing a civil complaint against UPS in the General Court of Justice, Superior Court Division, of Guilford County, North Carolina, alleging that UPS had retaliated against him in violation of REDA.

On February 9, 1998, UPS removed this case to the United States District Court for the Middle District of North Carolina pursuant to 28 U.S.C. § 1332. As stated in UPS's Notice of Removal, Wiley is a citizen and resident of the State of North Carolina and UPS is not a citizen of the State

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[1] REDA is a general anti-retaliation provision that prohibits employers in North Carolina from discriminating or retaliating against employees who exercise rights under North Carolina's workers' compensation statute, wage and hour statute, occupational safety and health statute, mine safety and health statute, National Guard reemployment rights statute, genetic testing/information anti-discrimination statute, or its statute prohibiting discrimination against individuals with the sickle cell trait or the hemoglobin C trait. N.C. Gen. Stat. § 95-241.

of North Carolina. Moreover, Wiley sought reinstatement; compensatory damages for lost wages, benefits and other economic losses from his termination on April 9, 1997 until his reinstatement; treble compensatory damages; and attorneys' fees.

Wiley never filed a motion to remand this action to state court, and never presented any objection of any kind to the District Court regarding this removal or the District Court's jurisdiction over this matter.

After the conclusion of discovery, UPS filed a motion for summary judgment with respect to Wiley's REDA claim. On August 17, 1999, the Honorable William L. Osteen, Sr. granted this motion and dismissed Wiley's lawsuit.

B. The Appellate Proceedings

On September 13, 1999, Wiley filed a timely notice of appeal to the United States Court of Appeals for the Fourth Circuit. On January 31, 2000, in his brief on appeal to the Fourth Circuit, Wiley objected for the first time to UPS's removal of this case and to the jurisdiction of the District Court. In this brief, Wiley argued that this case had been removed improperly in violation of 28 U.S.C. §1445(c) because his REDA claim "arises under" North Carolina's workers' compensation laws.

On April 27, 2001, in a *per curiam* decision, the Fourth Circuit affirmed the District Court's decision granting summary judgment to UPS. With regard to Wiley's argument that this case had been removed improperly, the Fourth Circuit held that Wiley had waived the right to object to the removal by failing to file a motion to remand or

otherwise raise this objection in the District Court. Specifically, the Fourth Circuit held:

> Even if Wiley's retaliation claim did arise under North Carolina's workers' compensation laws, Wiley nevertheless waived his right to object to the removal. Under 28 U.S.C. § 1447(c) a "motion to remand [a] case on the basis of any defect *other than lack of subject matter jurisdiction* must be made within 30 days after the filing of the notice of removal." (emphasis added). Thus, § 1447(c) provides that a party who fails to note a non-jurisdictional objection within 30 days of the notice of removal waives the objection. Violations of 28 U.S.C. § 1445(c) have been held to constitute procedural, and not jurisdictional, defects. *See, e.g. Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1117 (5th Cir. 1998); *Ayers v. ARA Health Servs., Inc.*, 918 F.Supp. 143, 146-7 (D. Md. 1995). Accordingly, a party seeking to invoke § 1445(c) must object to removal within thirty days after the filing of a notice of removal. Here, Wiley failed to object to UPS's removal of this suit in a timely manner. UPS filed its notice of removal on February 9, 1998. Wiley, however, did not object until the initiation of this appeal on September 13, 1999. Because his objection was made over thirty days after removal, he has waived his argument for improper removal.

Wiley v. United Parcel Service, Inc., No. 99-2277, slip op. at 3-4 (4th Cir. Apr. 27, 2001).

Wiley filed the instant Petition for Writ of Certiorari on July 25, 2001.

SUMMARY OF ARGUMENT

This case presents the simple question of whether a plaintiff can waive his right to chose between state and federal court by failing to object to removal pursuant to 28 U.S.C. § 1445 in a case allegedly arising under the workers' compensation laws of a state. Wiley mis-states the Question Presented in this case as whether, under 28 U.S.C. § 1445(c) and the Tenth Amendment, federal courts have subject matter jurisdiction over cases removed from state court that arise under a state's workers' compensation laws. This Question Presented reflects a fundamental misunderstanding of the difference between the concepts of subject matter jurisdiction and removal, and completely ignores this Court's holding in Grubbs v. General Electric Credit Corp., 405 U.S. 699 (1972). In Grubbs, the Court held that if a removed case originally could have been filed in federal district court, then a party who fails to object to removal prior to the entry of a judgment in the case in federal court cannot object to removal on appeal. Thus, the Question Presented in this case is whether Wiley's claim originally could have been brought in federal court.

In Horton v. Liberty Mut. Ins. Co., 367 U.S. 348 (1961), the Court held that cases arising under the workers' compensation laws of a state can be brought originally in federal court if the requirements of 28 U.S.C. § 1332 are

satisfied. Because it is undisputed that the requirements of 28 U.S.C. § 1332 are satisfied in this case, Wiley originally could have filed this action in federal district court. Therefore, the Fourth Circuit correctly held that Wiley waived his objection under 28 U.S.C. § 1445(c).

In addition to being incorrect on the merits, Wiley's Petition fails to identify any reason why the Court should accept this case. There is no conflict among the circuits on the issue decided by the Fourth Circuit. Moreover, even if a conflict did exist, this issue is not of sufficient importance to justify this Court's attention. Indeed, contrary to Wiley's misplaced attempts to cast this case as a dangerous assault on federalism and the Tenth Amendment, this dispute actually involves nothing more than the waivability of a plaintiff's right to chose between a state and a federal court, both of whom have subject matter jurisdiction, in cases arising under the workers' compensation laws of a state.

REASONS FOR DENYING WILEY'S PETITION

A. The Relevant Question In This Case Is Whether The Federal Courts Would Have Had Original Subject Matter Jurisdiction Over Wiley's Claim If That Claim Had Been Filed Originally In Federal District Court

In Grubbs v. General Electric Credit Corp., 405 U.S. 699 (1972) and Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996), the Court made clear that, when an action removed from state court has been tried in federal district court, there can be no further objection to the removal of that action if the case originally could have been filed in a federal court. Wiley's

REDA claim against UPS is an action removed from state court that has been tried to its conclusion in federal district court. As a result, the only issue for determination in this case is whether a federal district court would have had jurisdiction over Wiley's REDA claim if he originally had filed that claim in such a court.

Section 1441(a) of Title 28 of the United States Code provides that, "[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . ." to the appropriate federal district court. Section 1445 of Title 28 lists four (4) categories of cases that are "nonremovable": (a) a civil action in any state court against a railroad arising under 45 U.S.C. §§ 51-60; (b) a civil action in any state court against a carrier to recover damages for delay, loss, or injury of shipments arising under 49 U.S.C. §§ 11706 or 14706 (unless the amount in controversy exceeds $10,000); (c) a civil action in any state court arising under the workmen's compensation laws of such state; and (d) a civil action in any state court arising under § 40302 of the Violence Against Women Act of 1994.

Section 1447(c) of Title 28 provides that "[a] motion to remand [a] case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal . . . ." The legislative history of § 1447(c) makes clear that Congress intended this 30-day limit to apply to any removal defect other than a lack of subject matter jurisdiction:

> So long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal courts, or the parties, should be subject to the burdens of shuttling a case between the two courts that each have subject matter jurisdiction. There is also some risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means of forum shopping if the litigation should take an unfavorable turn. The amendment provides a period of 30 days within which remand must be sought on any ground other than lack of subject matter jurisdiction.

H.R. Rep. No. 100-889, at 72 (1988), reprinted in 1988 U.S.C.C.A.N. 5982, 6033.

Consistent with this statutory language and legislative history, this Court held almost thirty (30) years ago that a party cannot object to removal of a case for the first time on appeal if the district court that heard the case would have had original jurisdiction over the case had it been filed in that court in the first place. See Grubbs, 405 U.S. 699. In Grubbs, the Court was presented with a multi-party case in which, after the commencement of the action in state court, the original defendant filed a cross claim against the United States. The United States removed the action to federal court and there was no objection to this removal. The case was then tried in its entirety in federal court. On appeal, the Fifth Circuit Court of Appeals questioned *sua sponte* the propriety of the removal and the jurisdiction of the district court. After

concluding that the removal was not authorized by statute, the Fifth Circuit remanded the case to state court.

In reversing the Fifth Circuit's decision to remand the case to state court, this Court held as follows:

> Longstanding decisions of this Court make clear, however, that where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.

Id. at 702. In other words, a party who does not object to removal before an adjudication on the merits waives any such objection so long as the case originally could have been filed in federal district court pursuant to Chapter 85 of Title 28 of the United States Code, 28 U.S.C. §§ 1330-1368, or to some other relevant federal jurisdictional statute. Applying this doctrine to the facts before it, the Court concluded that, because the parties were citizens of different states, and because the amount in controversy was sufficient, the district court would have had original jurisdiction over this matter pursuant to 28 U.S.C. § 1332 had it been filed in that court initially. As a result, under the circumstances, the parties could not object to the improper removal for the first time on appeal.

In Caterpillar, 519 U.S. 61, the Court was asked to address the propriety of a removal from state court in a

slightly different context. This case involved a state law claim that had been removed from state court based on diversity jurisdiction even though, at the time of removal, it was undisputed that complete diversity did not exist between the parties. Unlike in Grubbs, however, there was no waiver because the plaintiff in Caterpillar filed a timely motion to remand. After the motion to remand was denied, but prior to trial, the non-diverse party was dismissed from the action. Thus, the district court did not have diversity jurisdiction over the case at the time of the improper removal but it did at the time of trial. On appeal, the plaintiff argued that the removal was improper and that he had preserved his right to object to that removal on appeal by filing a timely motion to remand in the district court. The Sixth Circuit Court of Appeals agreed and vacated the judgment of the district court.

This Court disagreed with the plaintiff's arguments and reversed the decision of the Sixth Circuit. Once again, the Court emphasized the distinction between jurisdiction and removability. As in Grubbs, the Court held that, in cases where a judgment has been entered by the district court, the question on appeal is not whether removal was proper, but, instead, whether the district court had original subject matter jurisdiction over the case at the time that it entered a judgment. If it did, even if the underlying removal was improper and even if the plaintiff filed a timely motion to remand, "considerations of finality, efficiency, and economy become overwhelming" and prohibit remand of the case. Caterpillar, 519 U.S. at 75.

In summary, in Grubbs, the Court established that a party who fails to raise an objection to removal before an

adjudication on the merits in the district court waives the right to make any such objection provided that the case originally could have been filed in federal court.[2] In Caterpillar, the Court held that, even if a party does object to removal in a timely manner, once the case has been adjudicated on the merits by the district court, concerns of finality, judicial economy and efficiency preclude the parties from raising such objections on appeal provided that the case originally could have been filed in federal court. Because Wiley's REDA claim has been litigated to its conclusion in the United States District Court for the Middle District of North Carolina, and because he did not object to removal until after judgment was entered against him, both of these cases, albeit for different reasons, preclude Wiley from objecting on appeal to the removal of this case to federal court ***unless*** this case could not have been brought in federal court by Wiley in the first place.

B. The Federal Courts Would Have Had Original Subject Matter Jurisdiction Over This Action If It Had Been Filed In Federal Court Initially

Section 1332(a) of Title 28 of the United States Code provides that federal district courts "shall have original

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[2] Grubbs appears to leave open the question of whether a party who fails to object to removal within thirty (30) days as required by 28 U.S.C. § 1447(c), but who does object prior to an adjudication on the merits by the district court, waives the right to raise non-jurisdictional objections to removal thereafter. As the cases discussed below illustrate, it is this question that has led to some apparent inconsistency among the circuit courts. This question is not relevant to Wiley's Petition, however, because Wiley did not object to removal in this case until after the District Court granted UPS's motion for summary judgment and dismissed Wiley's Complaint.

jurisdiction of ***all*** civil actions" where the matter in controversy exceeds $75,000 (exclusive of interest and costs) and is between citizens of different states. (emphasis added). For purposes of this rule, a corporation is deemed to be a citizen of any state in which it has been incorporated and of the state where it maintains its principal place of business. 28 U.S.C. § 1332(c)(1).

In this case, it is not disputed that the requirements of 28 U.S.C. § 1332 are satisfied. Wiley is a citizen of the State of North Carolina and UPS is not. Further, because Wiley seeks reinstatement; compensatory damages for lost wages, benefits, and other economic losses from the date of his termination on April 9, 1997 until his reinstatement in February 1999; treble compensatory damages under REDA; and attorneys' fees, this case easily satisfies § 1332(a)'s amount in controversy requirement.

Because the requirements of 28 U.S.C. § 1332(a) are satisfied, it is beyond question that Wiley's REDA claim falls within the original subject matter jurisdiction of the federal district courts. The only possible argument to the contrary – that 28 U.S.C. § 1445(c) supersedes 28 U.S.C. § 1332(a) in cases "arising under the workmen's compensation laws" of a state – was heard and rejected by this Court forty (40) years ago. In Horton v. Liberty Mut. Ins. Co., 367 U.S. 348 (1961), the Court explicitly rejected the argument that 28 U.S.C. § 1445(c) not only prohibited removal of workers' compensation actions to federal court, but also meant that such actions could not be filed originally in federal court. Specifically, the Court stated:

> The foregoing are some of the appealing considerations that led the District Court to conclude that it would frustrate the congressional purpose to permit insurers to file workmen's compensation suits in federal courts when Congress had deliberately provided that such suits could not be removed to federal courts if filed by claimants in state courts. But after the most deliberate study of the whole problem by lawyers and judges and after its consideration by lawyers on the Senate Judiciary Committee in the light of statistics on both removals and original filings, Congress used language specifically barring removal of such cases from state to federal courts and at the same time left unchanged the old language which just as specifically permits civil suits to be filed in federal courts in cases where there are both diversity of citizenship and the prescribed jurisdictional amount. In this situation we must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth.

Id. at 352 (footnote omitted); see St. Paul Ins. Co. v. Trejo, 39 F.3d 585, 587-88 (5th Cir. 1994) (district court erred in concluding that § 1445(c) prevented party from filing workers' compensation action in federal court where diversity jurisdiction existed); Home Indem. Co. v. Moore, 499 F.2d 1202, 1204-05 (8th Cir. 1974) (28 U.S.C. §1445(c) not relevant to existence of diversity jurisdiction under 28 U.S.C. § 1332); TIG Ins. Co. v. Deaton, Inc., 932 F. Supp.

132, 136 (W.D. N.C. 1996) (§1 445(c) is irrelevant in actions originally filed in federal court); Prescott v. United States, 523 F. Supp. 918, 939 (D. Nev. 1981) ("It is well-settled that although Title 28 U.S.C. § 1445(c) prevents workmen's compensation suits from being removed to federal court if filed by claimants in state courts, such suits may still be filed in federal court pursuant to Title 28 U.S.C. § 1332 if there is diversity of citizenship and the amount in controversy is in excess of [the statutory amount], exclusive of interest and costs."), aff'd, 731 F.2d 1388 (9th Cir. 1984).[3]

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[3] Consistent with Horton, federal courts routinely hear workers' compensation claims initially filed in federal court pursuant to 28 U.S.C. § 1332. See, e.g., Bausman v. Interstate Brands Corp., 252 F.3d 1111 (10th Cir. 2001); Barrera v. Con Agra, Inc., 244 F.3d 663 (8th Cir. 2001); Sanhueza v. Dillard Dep't Stores, Inc., 178 F.3d 1285 (Table), 1999 U.S. App. LEXIS 8263 (4th Cir. Apr. 29, 1999); Razor v. Perdue Farms, Inc., 176 F.3d 475 (Table), 1999 U.S. App. LEXIS 5924 (4th Cir. Apr. 1, 1999); Porter v. United States Alumoweld Co., 125 F.3d 243 (4th Cir. 1997); Blackwell v. Shelter Mut. Ins. Co., 109 F.3d 1550 (10th Cir. 1997); Stover v. Lincoln Pub. Co., 73 F.3d 358 (Table), 1995 U.S. App. LEXIS 37129 (4th Cir. Dec. 28, 1995); Johnson v. Pepperidge Farm, Inc., 23 F.3d 401 (Table), 1994 U.S. App. LEXIS 6968 (4th Cir. Apr. 4, 1994); Jackson v. Consolidation Coal Co., 21 F.3d 422 (Table), 1994 U.S. App. LEXIS 5190 (4th Cir. Mar. 22, 1994); Kidd v. Commonwealth Bolt, Inc., 2 F.3d 1149 (Table), 1993 U.S. App. LEXIS 20649 (4th Cir. Aug. 13, 1993); Moffitt v. Transit Mgmt., 8 F.3d 819 (Table), 1993 U.S. App. LEXIS 27629 (4th Cir. Oct. 22, 1993); Swearingen v. Owens-Corning Fiberglas Corp., 968 F.2d 559 (5th Cir. 1992); Pope v. Bethesda Health Ctr., Inc., 813 F.2d 1306 (4th Cir. 1987); Hill v. N. C. Dep't. of Correction, No. 5:98-CV-429-BO(2), 1999 U.S. Dist. LEXIS 5639 (E.D. N.C. Feb. 24, 1999), aff'd, 201 F.3d 436 (4th Cir. 1999); Sayers v. ABB C-E Servs., Inc., No. 4:97CV37, 1997 U.S. Dist. LEXIS 18304 (W.D. N.C. Oct. 14, 1997); McRae v. Robeson County Group Homes, No. 3:94-CV-17-BR (1), 1997 U.S. Dist. LEXIS 9668 (E.D. N.C. June 20, 1997); Munoz v. H & M Wholesale, Inc., 926 F. Supp. 596 (S.D. Tex. 1996); Phillips v. Ford Motor Co., No. 94-0632-CV-W-2, 1995 WL 866224 (W.D. Mo.

Because 28 U.S.C. § 1445(c) does not affect the original subject matter jurisdiction of the federal district courts under 28 U.S.C. § 1332, and because Wiley's REDA claim satisfies the requirements of 28 U.S.C. § 1332, Wiley could have filed this action originally in federal district court. Consequently, under both Grubbs and Caterpillar, the Fourth Circuit correctly held that Wiley cannot object to the propriety of UPS's removal of this case on appeal.

C. There Is No Split Among The Circuits Regarding Whether A Party Who Fails To Object To A District Court That Removal Is Improper Under 28 U.S.C. § 1445 Waives The Right To Assert Such An Objection On Appeal

Every federal court that has directly addressed a party's failure to object to a district court that a removal is improper under 28 U.S.C. § 1445 has held that such a party waives the right to object to removal on appeal. Williams v. AC Spark Plugs Div. of Gen. Motors Corp., 985 F.2d 783, 786-88 (5th Cir. 1993) (28 U.S.C. § 1445(c)); Feichko v. Denver & Rio Grande W. R. Co., 213 F.3d 586, 589 (10th Cir. 2000) (28 U.S.C. § 1445(a)), cert. denied, 121 S.Ct. 766 (2001); Lirette v. N.L. Sperry Sun, Inc., 820 F.2d 116, 117-18 (5th Cir. 1987) (28 U.S.C. §1445(a)); Carpenter v. Baltimore & O.R. Co., 109 F.2d 375, 379-80 (6th Cir. 1940) (28 U.S.C. § 1445(a)); Barber v. Pepsi-Cola Personnel, Inc., 78 F. Supp.2d 683, 694-95 (W.D. Mich. 1999) (28 U.S.C. § 1445(c)); United States Fid. & Guar. Co. v. McAuliffe, No. CIV.A. 94-4431, 1996 U.S. Dist. LEXIS 433, at *18-19 (E.D. Pa. Jan. 18, 1996) (28 U.S.C. § 1445(c)); Ayers v.

May 1, 1995); Ramirez v. IBP, Inc., 913 F. Supp. 1421 (D. Kan. 1995); Torsky v. Avon Prods., Inc., 707 F.Supp. 942 (W.D. Mich. 1988).

ARA Health Servs., Inc., 918 F. Supp. 143, 146-47 (D. Md. 1995) (28 U.S.C. §1445(c)); Nielsen v. Weeks Marine, Inc., 910 F. Supp. 84, 87 (E.D.N.Y. 1995) (28 U.S.C. § 1445(a)); Bearden v. PNS Stores, Inc., 894 F. Supp. 1418, 1422-23 (D. Nev. 1995) (28 U.S.C. § 1445(c)); Gunn v. Fisher of Ala., No. CV 93-B-1847-S, 1996 U.S. Dist. LEXIS 20952, at *3 (N.D. Ala. Mar. 24, 1994) (28 U.S.C. § 1445(c)).

The cases cited by Wiley for the proposition that the Fourth Circuit's decision in this case is in conflict with decisions of other circuits are inapposite because they do not directly address the question at issue. The case most prominently cited by Wiley in support of this contention is Humphrey v. Sequentia, Inc., 58 F.3d 1238 (8th Cir. 1995). Humphrey is not inconsistent with the Fourth Circuit's decision in this case. Indeed, Humphrey does not even address the issue decided by the Fourth Circuit in its denial of Wiley's appeal. In Humphrey, the plaintiff filed suit in state court alleging a violation of Missouri's workers' compensation retaliation statute. The defendant removed the case to federal court pursuant to 28 U.S.C. § 1331 based on the argument that the plaintiff's claim was preempted by federal law. Unlike Wiley and the plaintiff in Grubbs, the plaintiff in Humphrey filed a timely motion to remand in which he argued that removal was improper because there was no federal question jurisdiction and because 28 U.S.C. § 1445(c) precluded removal. The district court denied this motion and the plaintiff immediately appealed pursuant to 28 U.S.C. § 1292(a).

In its decision remanding this case to state court, the Eighth Circuit held that the plaintiff's case did not present a federal question because his state law claim was not

preempted by federal law and that, under 28 U.S.C § 1445(c), a claim for workers' compensation retaliation under Missouri law was not removable because it "arose under" the workers' compensation laws of the State of Missouri. Significantly, the Eighth Circuit did not address, and was not presented with, the waiver question at issue in this case because Humphrey filed a timely motion to remand in the district court arguing that removal was improper pursuant to 28 U.S.C. § 1445(c).[4] Thus, the Eighth Circuit's decision in Humphrey does not conflict with the Fourth Circuit's decision in this case.

Wiley's reliance upon Armistead v. C & M Transport, Inc., 49 F.3d 43 (1st Cir. 1995), Suder v. Blue Circle, Inc., 116 F.3d 1351 (10th Cir. 1997), and Reed v. Heil Co., 206 F.3d 1055 (11th Cir. 2000) to establish the existence of a conflict among the circuits is similarly unavailing. In Armistead, the First Circuit explicitly refused to decide whether the plaintiff's failure to assert that removal was improper pursuant to 28 U.S.C. § 1445(c) in a timely motion to remand resulted in a waiver of that objection.[5] 49 F.3d

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[4] Moreover, even though Caterpillar was not decided until more than a year after Humphrey, the "considerations of finality, efficiency, and economy" identified by this Court in Caterpillar would not have dictated a different result in Humphrey because, in that case, the removal issue was presented to the Eighth Circuit via an interlocutory appeal rather than after the case had been tried and resolved on the merits by the district court.

[5] Although not mentioned by Wiley in his Petition, the First Circuit in Armistead noted the existence of a perceived conflict on the issue of waiver between the Fifth Circuit's decision in Williams v. AC Spark Plugs Div. of Gen. Motors Corp., 985 F.2d 783 (5th Cir. 1993) and the Eighth Circuit's decision in Hurt v. Dow Chemical Co., 963 F.2d 1142 (8th Cir. 1992). There is no conflict between these two cases,

at 46. Instead, the First Circuit decided that removal was improper because, even if the plaintiff had waived this objection, the district court lacked original subject matter jurisdiction for a completely separate reason (i.e., because the case was not a "civil action" capable of being removed under 28 U.S.C. § 1441(a)). Id.

Wiley's reliance upon Suder for the proposition that a conflict exists among the circuits regarding the effect of a failure to object to removal is even more attenuated. In Suder, the employer removed a workers' compensation retaliation case from state court and the plaintiff filed a timely motion to remand in which he argued that removal was improper under 28 U.S.C. § 1445(c). The district court granted this motion and awarded fees and costs to the plaintiff. The only issue presented to or decided by the Tenth Circuit on appeal was the propriety of the district court's decision to assess attorneys' fees against the employer.

Finally, Wiley's reliance upon Reed to illustrate that the Fourth Circuit's resolution of this case creates a split among the circuits also is misplaced. In Reed, the plaintiff filed a workers' compensation retaliation claim in state court. The employer then removed the claim to federal court and

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however, that is relevant here. Both cases involve situations where the plaintiff failed to object to removal within thirty (30) days as required by 28 U.S.C. § 1447(c) but, in both cases, the plaintiff did object in the district court prior to a full adjudication on the merits. The Fifth Circuit in Williams extended the holding of Grubbs to find a waiver under these circumstances while the Eighth Circuit in Hurt did not. To the extent that a conflict between these two cases still exists after this Court's subsequent decision in Caterpillar, that conflict is not relevant to this case because Wiley's circumstances, and the Fourth Circuit's decision, both fall squarely within this Court's decisions in Grubbs and Horton.

the plaintiff "tried unsuccessfully to have the case remanded to state court." 206 F.3d at 1058. The plaintiff then argued on appeal that the district court lacked "subject matter jurisdiction" to hear his claim because it had been improperly removed. Id.

In agreeing with this argument, the Eleventh Circuit Court of Appeals did not discuss, and appears not to have been presented with, the waiver analysis set forth in Grubbs and followed by the Fourth Circuit in this case. A simple review of that analysis, however, easily explains the difference in outcomes between Reed and this case. In Grubbs, this Court held that, in a case falling within the original subject matter jurisdiction of the federal district courts, a party who fails to object to removal prior to the entry of judgment by a district court waives any and all such objections. Unlike Wiley, the plaintiff in Reed did not fail to object to removal prior to the entry of judgment by the district court and, therefore, did not waive any objections that he might have had to removal. Thus, no conflict exists between Wiley and Reed on this question.[6]

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[6] Reed also failed to cite the Court's decision in Caterpillar or to discuss the judicial economy rationale set forth therein. In doing so, the Eleventh Circuit reached a result that appears to be in conflict with Caterpillar. To the extent that such a conflict does exist, it is not one that appears at this time to require intervention by the Court because there is no reason to believe that the Eleventh Circuit will not follow Caterpillar if and when the issue is properly presented to it. In other words, there is no reason to believe that, if this conflict really exists, it will not resolve itself in due course. More important, however, is the fact that no conflict exists between Reed and the Fourth Circuit's decision in this case. As discussed above, the Fourth Circuit's holding in this case is based on the waiver doctrine and not on the judicial economy concerns expressed in Caterpillar.

In summary, starting with this Court's decision in Grubbs, the federal courts that have directly addressed the question are in agreement that a plaintiff in a case that originally could have been filed in federal court who fails to object to removal prior to the entry of a judgment waives any objection to removal – including an objection based on 28 U.S.C. §1445. As a result, there is no conflict among the circuits on this question and Wiley's Petition should be denied.

D. The Question Presented Is Not An Important Matter In Need Of The Court's Attention

Rule 10 of the Rules of the Supreme Court of the United States provides that one consideration that may guide the Court's discretion in granting a petition for a writ of certiorari is the existence of a conflict among the circuits on an "important matter". As noted above, the Petition presently before the Court should be denied because there is no conflict among the circuits on the issue decided by the Fourth Circuit in this case. The instant Petition also should be denied, however, because the issue in question is not an "important matter" worthy or in need of the Court's attention.

Again, the question presented is whether a plaintiff who strategically or inadvertently sits on an objection to removal until after the case has been fully adjudicated by a federal district court should be deemed to have waived any objection to said removal in cases where the matter originally could have been litigated in federal court. This question is not an "important matter" because it involves only a very small group of persons and because the "harm" to that group

is negligible. The persons affected by this issue are only those plaintiffs who fail or decide not to object to removal prior to the entry of a judgment by the federal district court. The effect on these persons is that they are required to litigate their claim in federal court, where they could have chosen to litigate initially, rather than state court. In other words, the significance of the question presented is that plaintiffs who sit on their objections to removal are denied the right granted to them by 28 U.S.C. § 1445(c) to chose to litigate in state court rather than federal court.

Contrary to Wiley's rhetoric regarding the Tenth Amendment, this case is not about the Constitution, federalism or the jurisdiction of the federal courts. This Court held quite clearly in Horton that federal courts have subject matter jurisdiction to hear claims arising under the workers' compensation laws of the various states so long as the requirements of 28 U.S.C. § 1332 are satisfied. As a result, Wiley's statement that the Court must intervene to "prevent the federal district courts from hijacking state jurisdiction in cases that arise under the state workers' compensation laws" is as misplaced as it is melodramatic. The simple fact of the matter is that this case is about nothing more than how forgiving the federal courts should be to that small group of plaintiffs who, by reason of incompetence or strategy, fail or refuse to object to a removal prior to losing on the merits in federal court when the only "harm" suffered by them is that they have had to litigate the case in federal court, where they could have filed suit initially, rather than state court. Even if a conflict among the circuits does exist on this question, this is not an issue of sufficient importance to warrant intervention by the Supreme Court.

CONCLUSION

For the foregoing reasons, Wiley's Petition should be denied.

Respectfully submitted,

Brian D. Edwards*
Meredith W. Holler
ALSTON & BIRD LLP
Bank of America Plaza
101 South Tryon Street, Suite 4000
Charlotte, North Carolina 28280-4000
(704) 444-1000 – Telephone
(704) 444-1111 – Facsimile
Attorneys for Respondent

* *Counsel of Record*